

PUBLIC PROSECUTOR

v.

ARIS YUNUS

HIGH COURT MALAYA, KUALA LUMPUR
MAHADEV SHANKAR J
[FEDERAL TERRITORY CRIMINAL TRIAL NO. 37/85]
6 OCTOBER 1988

CRIMINAL PROCEDURE: *Trafficking - Caution statement - Admissibility of - 2 persons arrested - 1 charged - Promise that if one confesses the other goes free - Caution statement inadmissible - Burden of proof at end of prosecution's case - Occupation of premises - Possession - Custody/care/control - Sufficient exclusivity of possession required - Evidence fell short of establishing that accused was occupier of premises or in possession of drugs - Evidence given in trial within trial - Cannot be extracted piecemeal to sustain charge.*

The accused was charged with trafficking in 4367.8 grams of cannabis. The evidence led by the prosecution fell into 2 compartments:

- (i) evidence of the raiding officers; and
- (ii) a caution statement containing an alleged confession.

A party of 6 police personnel acting on information received carried out a raid on an unnumbered house. The door of the house when knocked by the police was opened by one Rusly bin Yunus ("Rusly"). The police had to force their way into the house and as they gained entrance they saw the accused coming out from the kitchen. A search was carried out in the kitchen by the police in the presence of both Rusly and the accused. In the kitchen the police found the cannabis in a sack and a blue canvas zip bag.

Both Rusly and the accused was placed under arrest and brought to the Cawangan Anti-Dadah ("CAD") and handed over to the investigating officer who took them back to the house with a police photographer for photographs. Then they returned to the CAD where the accused was handed to another inspector who proceeded to record a caution statement.

Both the accused and Rusly were charged with trafficking in the Magistrate's Court but the DPP's consent to prosecute was against the accused only. Rusly was acquitted and discharged.

A trial within a trial was held in respect to the caution statement. The accused contended that the caution statement was made because Rusly and he were told by the police that if one of them admitted possession of the drugs the other would be set free - both Rusly and the accused gave evidence of this. The police denied this.

The question before the Court was whether the accused should be called on to enter his defence.

Held:

[1] In order to render the cautioned statement admissible it must be voluntarily. The onus of proving that lies upon the prosecution.

[2] In all the circumstances of this case the Court was left in grave doubt on this issue and hence the Court excluded the statement as being inadmissible.

- a** [3] The essential element which the prosecution had to establish against the accused was in possession of these drugs and possession has to be established by evidence.
- [4] Mere possession in premises does not make the person present an occupier as there must be a sufficient exclusivity of possession to make a person an occupier.
- b** [5] In the present case the totality of the prosecution evidence only went to show that when the house was raided the accused and Rusly were found present inside and there was no evidence to show one or the other was in occupation of the premises.
- [6] In the circumstances the accused was acquitted without being called upon to enter upon his defence.
- [Accused acquitted and discharged.]*
- c** **Cases referred to:**
Haw Tua Tau v. PP [1981] CLJ (Rep) 11
A. Ragunathan v. Pendakwa Raya [1982] CLJ (Rep) 63
Pavone v. PP [1983] CLJ (Rep) 855
Munusamy v. PP [1987] CLJ (Rep) 221
PP v. Jamali bin Adnan [1985] CLJ (Rep) 656
- d** *R. v. Too* [1976] 3 All ER 65
Bright v. Police [1972] NZLR 1916
PP v. Foo Jua Eng [1966] 1 MLJ 197
R. v. Abbott [1955] 2 All ER 899
- Legislation referred to:**
 Dangerous Drugs Act 1952, ss. 37A(1), 39B(3)
- e** **Other source referred to:**
Sarkar on Evidence, 10th Edn., pp. 202 to 223
For the public prosecutor - Tan Poh Lai
For the accused - Gulam Mustaffa Nadar Alim Khan; M/s. Ghulam Mustaffa & Co.

JUDGMENT

- f** **Mahadev Shanker J:**
- Aris bin Yunus stands accused of trafficking in 4367.8 grams of cannabis on 8 September 1984.
- The evidence led by the prosecution against him falls into two compartments. There is the evidence of the raiding officers, and there is a caution statement containing an alleged confession which was held inadmissible after a trial within a trial.
- g** The issue before the Court is whether the prosecution have made out a *prima facie* case requiring the Court to call upon the accused to enter upon his defence.
- Acting on information received Inspector Mokhtar bin Haji Mohamed (PW1) accompanied by D/Kpls Borian bin Abdul Razak (PW3), Mustapha Kamal bin Yahya, Zakee bin Hussin, and DPC's Disi bin Adnan, and Yusof bin Mohamed approached an unnumbered house in Jalan Kuching Kuala Lumpur. It was about 5.30 p.m. on 8 September 1984. On arrival at the house the party split into two groups. Insp. Mokhtar, Borian and Mustapha Kamal went to the front. Zaki, Yusoff and Disi went to the rear.
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- i**

Then Insp. Mokhtar knocked on the front door which was locked. The door was opened by one Rusly bin Yunus. Insp. Mokhtar Borian and Mustapha Kamal forced their way in. As soon as they gained entrance they saw Aris bin Yunus coming from the direction of the kitchen. Inspector Mokhtar then immediately brought Rusly and Aris back to the kitchen. On arrival there he says he opened the kitchen door which led to the back of the house. Zaki, Yusoff and Disi then immediately entered the kitchen which was searched in the presence of Rusly and Aris.

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Inside a large sack normally used for carrying sugar (Ex. P5) was found another plastic wrapper. Inside this was a large quantity of cannabis (P6). Next on a dish rack was found a blue canvas zip bag (P7). Inside this was a red plastic bag containing cannabis (P10), another paper package containing cannabis (P11), five more paper packages each containing four bundles of 25 rolls each of cannabis ready for consumption, (Ex. P12 to P16) and 2 bundles of brown paper of the same kind used to roll up the cannabis found in Ex. P12 to P16. These 2 bundles of brown paper were marked Ex. P9A & B.

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Aris and Rusly were both placed under arrest and brought to the Cawangan Anti Dadah (CAD) at the Ibu Pejabat Kontingent Headquarters at Jalan Hang Tuah Kuala Lumpur. Here they were handed over to the Investigation officer Insp. Hassan Jalaluddin bin Abdul Malik (PW4). Whilst Insp. Mokhtar then proceeded to mark the exhibits in his room, Insp. Hassan took Aris and Rusly back to the house accompanied by Borian (PW3), Zaki and the police photographer D/Kpl Ariffin (PW2). After the photographs were taken both Aris and Rusly were brought back to the CAD.

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Then Inspector Hassan handed over Aris to Inspector Raja Mohamed Khalid bin Mohamed who proceeded to record a caution statement (Ex. 1D19).

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Thereafter Rusly and Aris were jointly charged with trafficking in the drugs aforesaid. They were first produced in the Magistrate's Court on 21 September 1984, and then on 22 November 1984, 16 January, 15 March, 16 May and finally on 22 July 1985. On 27 June 1985 Encik Mohd Noor bin Haji Ahmad the DPP issued a consent to prosecute under s. 39B(3) of the Dangerous Drugs Act 1952 (the Act). But the consent was to prosecute Aris bin Yunus only. On 22 July 1985 he alone was acquitted and discharged but he was made to sign a bond undertaking to appear whenever required as a witness in the High Court in the trial of Aris.

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When the prosecution sought to put in the caution statement made by Aris as part of its case against him defence Counsel Encik Ghulam Mustafa objected to its admissibility. I therefore held a trial within a trial at the conclusion of which I ruled that the statement was inadmissible. My reasons for so holding were as follows.

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The defence had strenuously contended from the very outset that Aris had made the statement because Rusly and he had been told by the police that if one of them admitted possession of the drugs the other would be set free.

In order to render the caution statement admissible it must be voluntary. The onus of proving that lies upon the prosecution. The only authorities cited to assist the Court in this task was *Sarkar on Evidence* 10th Edn., pp. 202 to 223: The passages reproduced hereunder are particularly relevant since s. 37A(1) of the Act lays down in its proviso that no such statement shall be used if the making of the statement **appears** to Court to be caused by any inducement, threat or promise. The word used is not "proved" but "appears".

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- a** It is possible for an accused to show without proving his allegation by evidence, that the circumstances under which a confession was made would justify an inference that it was obtained by threat or inducement (*Kiro v. R.*, 33 CWN 1112: 57C 649: A1929, C. 726). (*Sarkar* p. 126). If there is any conflict as to the manner in which the confession was obtained, the accused should be given the benefit of doubt (*Rahaman v. R.*, A1930, 1.88). When it is doubtful to the Judge whether an explanatory statement by the accused was not given as a result of inducement, it should not be admitted in evidence. (*Joymangal v. S.*, 59 CWN 993).
- b** Whenever any sort of doubt creeps into the mind of the Court or when the question of voluntariness is raised by the accused, the better and sounder opinion certainly is that it is for the prosecution to show affirmatively to the complete satisfaction of the Court the voluntary nature of the confession. (*Sarkar* p. 217).
- c** In *Hemraj v. State* 1954, SCR 1133: A1954, SC 462, the Supreme Court observed that “the principle laid down in that case (*R. v. Thompson*) is well settled”. *R. v. Thompson*, being approved by the Supreme Court the position is that ordinarily a confession duly taken in accordance with law would be relevant; but in case of any doubt or when challenged, it is for the prosecution to show affirmatively to the satisfaction of the Court that the confession was voluntary. If there is the slightest doubt or suspicion about its voluntary nature, the scale will be turned in favour of the accused (*ante*: “Appears to have been caused” pp. 205, 216) and the burden is on the prosecution to show that it was voluntarily made. (*Sarkar* p. 217).
- d** If a man is told by a person in authority that if he gives a true account of the matter he will be pardoned, that is continuing offer, the thread of which continues unbroken until it is accepted by the confession which completes the bargain, unless there is some circumstance which breaks it so as to show that the inducement no longer operates and that the person confessing has no longer any hope of gaining anything from the authorities by making the confession. (*Sarkar* p. 221). It is not necessary for the defence to establish conclusively that there was inducement or threat. It is sufficient if the circumstances afford reasonable grounds for believing that was such an inducement or threat (*Mohsena v. R.* 43 CWN 893; A1939, C 610; *R. v. Thekur*, 1943, 1 Cal. 487). The inference may be suggested by the confession itself or by the evidence adduced by the accused or by the surrounding circumstances which the Court is bound to take into consideration, but the conclusion cannot be reached on surmise or conjecture (*Budhoo v. R.* A1928, L 676: 108 1C 387: *R. Dewan Kahar*, A1923, p. 13: 72 1C 961). (*Sarkar* p. 216).
- f** Serious reservations about the voluntary nature of this caution statement were created by Rusly bin Yunus who gave his evidence on oath. He was unshaken in cross-examination and I was not prepared to brush aside his testimony as being wholly unworthy of credit even taking into consideration that as Aris’s brother he had a bias in favour of the accused. In effect what he said was that when Aris and he were brought back to the CAD by Inspector Hassan, after they were taken to Inspector Mokhtar’s room. The exhibits were on the table.
- g** Inspector Mokhtar, Inspector Hassan, and the members of the raiding party and Inspector Raja Khalid were all there when Inspector Mokhtar is alleged to have made the inducement, promise or threat that if one admitted one could go free but if not there would be trouble.
- h** The accused’s version of the incident is substantially the same. There are discrepancies as to detail and in some respects it seems to me that the accused may have exaggerated the number of times the threat was made and the police personnel who made it. The bottom line of this balance sheet however is whether the accused had created a real doubt as to whether the promise was made and if so whether it motivated the giving of the statement in question.
- The police personnel involved of course all stoutly denied that any threat, promise or inducement had been made as alleged or at all. But the obvious difficulty in such a situation is that if it had, they would not be likely to admit it. One has therefore to look at the
- i** extraneous evidence.

Here there are several very curious features which are disturbing, and one needs to view them against the backdrop of the whole case.

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At the scene itself Insp. Mokhtar claims he asked no questions at all as to who was the owner or custodian of the exhibits. At first he denied he questioned them at his office at the CAD. Then he said he could not remember. Borian also seems to have trouble in remembering if Insp. Mokhtar questioned Rusly and Aris. Insp. Hassan says he does not know of any interrogation.

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This was a very large haul. The gross weight was 5063 grams and the street value was about RM15,000. The absence of any curiosity on the part of the raiding officers and the IO as to the ownership, control or source of the drugs is strange. If the police evidence is to be believed all that happened was that Insp. Mokhtar handed the two accused to the IO, who in turn handed the accused to Raja Khalid for his statement to be recorded without telling Raja Khalid anything more than the report number and the fact that Aris had been arrested in a drug case.

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On the face of it Ex. 1D19 fully complied with the requirements of the law as to form. It recites the caution and the proper questions as to whether the accused had been offered any inducement, threat or promise. It carries the initials of the accused on every page and without any extraneous evidence to suggest otherwise it would appear to have been regularly recorded.

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But the contents of the statement viewed against the other evidence again causes severe disquiet. The accused did not volunteer any information at all. Everything attributed to him is in the form of question and answer. Yet there is nothing at all in the statement to show that the recording officer asked a single question as to the source of this enormous quantity of cannabis or what role if any Rusly had in this case. The statement is very short and it seems to have been geared to obtaining an admission that Aris was the sole culprit in this transaction.

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In his evidence in the trial within the trial Insp. Mokhtar admitted that when the two accused were brought back to the CAD by Insp. Hassan, he met them in his room, but he claims he did not speak to them. Then he said they were kept at the enquiry office. Borian's evidence as to who was in Insp. Mokhtar's room when they returned from the second visit to the house is not quite satisfactory because he is unable to remember what all of them were doing in Insp. Mokhtar's room.

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Even if Insp. Raja Khalid's conduct cannot otherwise be criticised, I still need to ask myself whether, if in fact a promise was made in Insp. Mokhtar's room a few minutes earlier, the force of that promise had been removed by Insp. Raja Khalid's caution, or whether Aris still hoped that by taking the rap he would be making it possible for his brother Rusly to be set free.

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In all the circumstances of this case I was left in grave doubt on this issue and hence my decision to exclude the statement.

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Once the caution statement was excluded the case for the prosecution had to stand or fall on the evidence that had been adduced outside the trial within the trial.

In deciding whether the totality of this evidence amounted to a *prima facie* case one needs to keep in the forefront of one's mind that although the door of this house was locked, it was Rusly who opened the door. Both of them were in the house. But only one of them has been charged. What was there to connect the drugs to the one rather than to the other.

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a The learned DPP and defence Counsel drew my attention to *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11, *A. Ragunathan v. Pendakwa Raya* [1982] CLJ (Rep) 63, *Pavone v. PP* [1983] CLJ (Rep) 855, and *Munusamy v. PP* [1987] CLJ (Rep) 221 on the onus of proof on the prosecution at the close of the case for the prosecution. For the purpose of the case for all I needed to ask myself was whether there was some evidence, not inherently incredible which if I were to accept established each essential element in the alleged offence.

b The essential element which the prosecution had to establish against Aris was that it was he who was in possession of these drugs. The charge of trafficking here arose because the quantity of cannabis recovered exceeded the prescribed maximum under s. 37(da) of the Act whereby trafficking is presumed from possession in excess of the prescribed quantity.

c But possession has to be established by evidence. What possession means in law, I have dealt with at length in *PP v. Jamali bin Adnan* [1985] CLJ (Rep) 656. Custody, care, and/or control are all badges of possession. But these elements must also be established by evidence.

d The starting point here was to determine who was the occupier of the premises on which the drugs were found. Mere presence in premises does not make the person present an occupier. There must be a sufficient exclusivity of possession to make a person an occupier: See *R. v. Too* [1976] 3 All ER 65. In *Bright v. Police* [1972] NZLR 1916 an occupier was defined as a person who has the right to use the premises for such purposes as he wishes principally in the case of a dwelling house for the purpose of habitation.

e In the present case the totality of the prosecution evidence only went to show that when the house was raided the accused and Rusly were found present inside it. Rusly opened the door. Aris was seen coming towards the front door from the direction of the kitchen. These two facts by themselves do not establish that one or the other of them was in occupation of the premises. Insp. Mokhtar's evidence on the point is significant. In cross-examination he said:

When I entered it there was nobody in that room. The room looked as if it was being occupied. I don't know who are the occupiers of this room. I don't know if it was rented out.

f Q) Put there were in all three rooms, first room by accused, second by two persons who were the tenants and third occupied by two others.

A) I would not know about that.

A little later just before he was re-examined Insp. Mokhtar said:

I do not know how many people occupied these premises. I am not the IO.

g Borian in cross-examination said:

As result of that information we raided the house. Before that date I had not seen Rusly or the accused person. I did not know if the accused was living in the house.

Nobody else gave any information as to occupancy let alone on the question of possession and control.

h So what the prosecution was left to rely upon was the alleged proximity of the accused to the drugs in order to establish possession. After I reserved judgment the learned DPP drew my attention to *PP v. Foo Jua Eng* [1966] 1 MLJ 197. In that case the High Court on appeal held that the learned Magistrate should in view of the physical proximity of the respondent to the exhibits have found that there was a case for her to answer. But the facts in that case

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were as follows. On information received, a police officer raided a top floor room of a house. On approaching the said room the respondent was seen some three feet from the dressing table on which the incriminating exhibit was lying. On seeing the police officer the respondent tried to close the door but it was eventually forced upon by the police officer. In his judgment Y.A.M. Sultan Azlan Shah (Raja Azlan Shah J as he then was) said:

With regard to the mental element, the learned Magistrate rightly directed his mind that knowledge of consciousness would depend on the surrounding circumstances. However he failed to direct his mind adequately on the facts. He directed his mind to the circumstance when the respondent tried to close the door on PW1. But he failed to consider the other circumstance which, taken together, may well be that the element of possession was proved. That circumstance is the physical proximity of the respondent to the exhibit in question.

The distinction is that in this case there were two persons in the house and there is no evidence as to which one of the two or both had the care or management of the premises. I drew the attention of the learned DPP to the case of *R. v. Abbott* [1955] 2 All ER 899 especially that part of the judgment as p. 901 which reads:

If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the Jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If in those circumstances it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty. Pinnemore J remembers a case in which two sisters were indicted for murder and there was evidence that they had both been in the room at the time when the murder of the boy was committed: but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case.

As I have earlier indicated Rusly and Aris were jointly charged at first, but Rusly was acquitted without any evidence being offered against him. Aris now stands alone. In the last analysis the only material evidence against him is that he was seen walking towards the front of the house from the kitchen when the front door was opened in response to Insp. Mokhtar's knocking. Such evidence falls very far short of establishing that Aris was the occupier of the premises let alone being in possession of the drugs. After I gave my ruling on the inadmissibility of the caution statement the learned DPP closed the case for the prosecution. The evidence given in the trial within the trial only related to the admissibility of the document. Portions of that evidence cannot be extracted piecemeal to sustain the charge because it would appear that as far as substantive evidence is concerned the trial within the trial is a self contained compartment.

Before I deliver my verdict there is one other point I must mention which has troubled me. The police had no search warrant to enter this dwelling. Borian gave evidence that he thought Anti-Dadah officers are immune from this legal requirement and can therefore force their way into private houses on the basis of information received. The point was not argued even though I invited attention to this, so I make no finding on the aspect of the case. Nor was a search list made up for the articles recovered from the premises. That a live chicken was able to enter the kitchen and assume "occupation" of the rack where the blue bag was found does seem to indicate that the place was left open after the raiding party had left.

a In conclusion I would express my regret that the culprits involved in bringing this very large quantity of ganja into that house, evidently for redistribution have not been brought to justice, but with evidence before me being what it is I must return the only verdict which is open to me in this case.

b The accused Aris bin Yunus is acquitted and discharged without being called upon to enter upon his defence.

Also found at [1989] 1 CLJ 239

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